

A **SYARIKAT PEMBINAAN YEOH TIONG LAY SDN BHD**

v.

NAGARAJAN SENGODEN

B HIGH COURT MALAYA, KUALA LUMPUR
LEE SWEE SENG JC
[ORIGINATING SUMMONS NO: S-24-847-2010]
23 AUGUST 2010

C **CIVIL PROCEDURE:** *Action - Withdrawal of - Plaintiff seeking to withdraw its originating summons on date of hearing - Principles applicable - Distinction between “withdrawal” and “discontinuance” - Whether plaintiff ought to be allowed to discontinue its action - Rules of the High Court 1980, O. 21*

D **CIVIL PROCEDURE:** *Originating summons - Withdrawal of action - Plaintiff seeking to withdraw its originating summons on date of hearing - Principles applicable - Distinction between “withdrawal” and “discontinuance” - Whether plaintiff ought to be allowed to discontinue its action - Rules of the High Court 1980, O. 21*

E **WORDS & PHRASES:** *“withdrawal” and “discontinuance” - Distinction between the two - Rules of the High Court 1980, O. 21*

F The plaintiff herein sought to withdraw its originating summons on the date of hearing on the ground that the issue of contention had become academic. The defendant objected to the same, necessitating a consideration by this court of the circumstances under which a plaintiff may withdraw or discontinue an action filed in court before the hearing date.

G **Held (striking out the originating summons):**

(1) The court has a discretion to allow a plaintiff to discontinue an action that it has started and, on the facts of this case, there was nothing that militated against a discontinuance being granted. In this instance, the plaintiff had asked for the action to be withdrawn. Order 21 Rules of the High Court 1980 seems to differentiate between “withdrawal” and “discontinuance”. It would appear that “withdrawal” is used for matters like appearance, defence, any particular claim or even a summons as in an application, whereas “discontinuance” is used with respect to an action, a claim or a counterclaim. In other

words, “discontinuance” is used with respect to the main suit or action, whether that of the plaintiff or defendant. What is withdrawn generally leaves behind something outstanding to proceed with, while what is discontinued would normally leave nothing else to proceed further. There is an end to the whole matter. It may be a fine distinction, but it is a distinction nevertheless. In the circumstances, the plaintiff was allowed to discontinue its action against the defendant with liberty to file afresh. (paras 9, 12, 13, 16 & 17)

Case(s) referred to:

Covell Matthews & Partners v. French Wools Ltd [1977] 1 WLR 876 (*refd*)
Hanhyo Sdn Bhd v. Marplan Sdn Bhd & Ors [1991] 3 CLJ 1783; [1991] 2 CLJ (Rep) 684 HC (*refd*)

Legislation referred to:

National Land Code, ss. 326(1B), 327
 Rules of the High Court 1980, O. 21 rr. 1, 2(1), (2), (4), 3(1), 4, 6

For the plaintiff - LL Woon (K Ganesh with him); M/s Izral Partnership
For the defendant - In person; S Bala assisting

Reported by Suresh Nathan

JUDGMENT

Lee Swee Seng JC:

Prologue

[1] A court of law is generally not concerned with an issue that is purely academic. The issue may be hot when the action is filed but by the date of hearing, the issue might have become academic. Here the plaintiff sought to withdraw its originating summons on the hearing date substantially on that ground but the same was objected to by the defendant. Under what circumstances may a plaintiff withdraw or discontinue an action filed in court before the hearing date?

Parties

[2] The plaintiff was at all material times the registered owner of a piece of land on which is a six-storey building bearing address No. 6, Jalan Hang Lekui, 50100, Kuala Lumpur (the said land). On 28 December 2009 the plaintiff entered into a sale and

A purchase agreement to dispose of the said land to Bonodon Music Sdn Bhd subject to the terms and conditions therein. The completion date was originally scheduled on 27 March 10.

B [3] The defendant had been a tenant of the plaintiff *vide* a Tenancy Agreement dated 19 January 2007 for a period of two years commencing 1 October 2006 and ending 30 September 2008 subject to the terms and conditions therein. Upon the expiry of the tenancy the defendant was allowed to remain in the premises on a month-to-month basis as a tenant at will with the payment of a monthly rent of RM6,500 per month.

C [4] The defendant was in arrears of rental for December 2008 to March 2009 amounting to RM19,500 and so the plaintiff wrote to the defendant by their letter dated 17 March 2009 demanding payment of the same and reiterating that the tenancy had expired on 30 September 2008 and that the tenancy was on a 'month-to-month' basis since 1 October 2008. Exhibit of the plaintiff marked P-2. Subsequently a Notice of Termination was sent to the defendant via its solicitors dated 7 December 2009 giving the defendant two months notice to quit and deliver vacant possession to the plaintiff (exh. P3). The notice also claimed for payment of arrears of rental of RM13,000 and also unpaid sewerage and water charges of RM1,305.57.

Problem

F [5] The plaintiff was surprised to learn from its solicitors that the defendant had lodged a private caveat against the said land *vide* presentation no. 249/2010 on 8 January 2010. The ground for the defendant entering the said caveat was that the defendant was having discussion with the plaintiff for the purchase of the property and that pending a final decision the defendant's interest had to be protected. This was of course denied by the plaintiff. The plaintiff stated categorically that there was no discussion with the defendant on the sale of the land to him, much less an 'oral agreement' to that effect. The defendant had stated in his affidavit that he had felt aggrieved as the plaintiff had not told him about the sale of the said land and had not given him the first right of refusal to purchase the property. There was in any event no agreement on such a right to the defendant.

I [6] The plaintiff proceeded to apply to the Registrar of Land Titles for the removal of the caveat and the Registrar duly served Borang 19C on the defendant on 30 March 2010 and the said

caveat was duly removed on 31 May 2010 under s. 326(1B) of the National Land Code 1965 as the defendant had not filed any application to extend the same. A

Prayers

[7] Meanwhile the plaintiff had filed on 19 April 2010 an Originating Summons for removal of the said caveat under s. 327 of the National Land Code, 1965 besides praying for arrears of rental and also of double rental and also arrears of electricity, water and sewerage charges. B

[8] On the date of hearing of the Originating Summons on 2 July 2010, the plaintiff counsel informed the court that as the said caveat had been removed it is now academic to proceed with the matter. In any event the said caveat having being removed there was then no more caveat against the said land that needed to be removed. Further the said land had been registered in the name of the new purchaser Bonodon Music Sdn Bhd. The plaintiff asked for withdrawal of the whole action with liberty to file afresh for the other prayers as it was a matter that could be more conveniently claimed in the subordinate courts and as there were counter-allegations of wrongful removal of the defendant from the said land, the defendant too can bring an action against the plaintiff accordingly. The defendant had not prayed for any counterclaim via their affidavit in reply. C
D
E

Principles

[9] The court has a discretion to allow a plaintiff to discontinue an action that it has started. O. 21 r. 3 of the Rules of the High Court 1980 reads: F

3(1) Except as provided by rule 2, a party may not discontinue an action (whether begun by writ or otherwise) or counterclaim, or withdraw any particular claim made by him therein, without the leave of the Court, and the Court, hearing an application for the grant of such leave may order the action or counterclaim to be discontinued, or any particular claim therein to be struck out, as against any or all of the parties against whom it is brought or made on such terms as to costs, the bringing of a subsequent action or otherwise as it thinks just. G
H

(2) An application for the grant of leave under this rule may be made by summons. I

A [10] In *Hanhyo Sdn Bhd v. Marplan Sdn Bhd & Ors* [1991] 3 CLJ 1783; ([1991] 2 CLJ (Rep) 684), Lim Beng Choon J at p. 1791; (p. 693) set out the principles relating to discontinuance of an action. This is what the learned judge said:

B The principles that can be extracted from the aforementioned cases are that the court would not compel a plaintiff to continue his action against a defendant if he does not want to do so provided no injustice is caused to the defendant. Injustice would be caused to the defendant if:

C (1) the discontinuance was made with ulterior motive to obtain a collateral advantage as in the case of *Castanho v. Brown & Root Ltd* ([1981] AC 557);

D (2) the discontinuance was not made *bona fide* by the plaintiff but it was made in order to obtain an advantage to which he has no right to retain since he has ceased to be *dominis litis* as the defendant has a perfectly good defence – see *Overseas Union Finance Ltd v. Lim Joo Chong* ([1971] 1 LNS 101);

E (3) by the discontinuance of the action the defendant would be deprived of an advantage which he has already gained in the litigation – see *Covell Matthews & Partners v. French Wools Ltd* ([1977] 2 All ER 591).

F [11] In *Covell Matthews & Partners v. French Wools Ltd* [1977] 1 WLR 876, Graham J said, at 879:

G The principles to be culled from these cases are, in my judgment, that the court will, normally, at any rate, allow a plaintiff to discontinue if he wants to, provided no injustice will be caused to the defendant. It is not desirable that a plaintiff should be compelled to litigate against his will. The court should therefore grant leave, if it can, without injustice to the defendant, but in doing so should be careful to see that the defendant is not deprived of some advantage which he has already gained in the litigation and should be ready to grant him adequate protection to ensure that any advantage he has gained is preserved.

H [12] Here none of the situations that militate against a discontinuance exist.

I [13] The plaintiff had asked for the action to be withdrawn. Order 21 of the Rules of the High Court seems to differentiate between a ‘withdrawal’ and a ‘discontinuance’.

[14] A 'withdrawal' is used in the following context (emphasis added for illustration purpose): A

1. O. 21 r. 1 A party who has entered an appearance in an action may **withdraw the appearance** at any time with the leave of the Court.

B

2. O. 21 r. 2(2) A defendant may, without the leave of the Court:

(a) **withdraw his defence** or any part of it at any time;

(b) discontinue a counterclaim, or **withdraw any particular claim** made by him therein, as against any or all of the parties against whom it is made, at any time not later than 14 days after service on him of a defence to counterclaim or if the counterclaim is made against two or more parties, of the defence to counterclaim last served, by serving a notice in Form 36 to that effect on the plaintiff or other party concerned.

C

D

3. O. 21 r. 2(4) If all the parties to an action consent, the action may be **withdrawn** without the leave of the Court at any time before trial by producing to the Registrar a written consent to the action being withdrawn signed by all the parties.

E

4. O. 21 r. 3(1) Except as provided by r. 2, a party may not discontinue an action (whether begun by writ or otherwise) or counterclaim, or **withdraw any particular claim** made by him therein, without the leave of the Court, and the Court hearing an application for the grant of such leave may order the action or counterclaim to be discontinued, or any particular claim made therein to be struck out, as against any or all of the parties against whom it is brought or made on such terms as to costs, the bringing of a subsequent action or otherwise as it thinks just.

F

G

5. O. 21 r. 4 Subject to any terms imposed by the Court in granting leave under r. 3, the fact that a party has discontinued an action or counterclaim or **withdrawn a particular claim** made by him therein shall not be a defence to a subsequent action for the same, or substantially the same, cause of action.

H

6. O. 21 r. 6 A party who has taken out a **summons** in a cause or matter may not **withdraw** it without the leave of the Court.

I

A [15] A 'discontinuance' is used in the following context (emphasis added for illustration purpose):

B 1. O. 21 r. 2(1) The plaintiff in a action begun by writ may, without the leave of the Court, **discontinue the action**, or withdraw any particular claim made by him therein, as against any or all of the defendants at any time not later than 14 days after service of the defence on him or, if there are two or more defendants, of the defence last served, by serving a notice in Form 36 to that effect on the defendant concerned.

C 2. O. 21 r. 2(2) A defendant may, without the leave of the Court:

D (b) **discontinue a counterclaim**, or withdraw any particular claim made by him therein , as against any or all of the parties against whom it is made, at any time not later than 14 days after service on him of a defence to counterclaim or if the counterclaim is made against two or more parties, of the defence to counterclaim last served, by serving a notice in Form 36 to that effect on the plaintiff or other party concerned.

E 3. O. 21 r. 3(1) Except as provided by rule 2, a party may not **discontinue an action** (whether begun by writ or otherwise) or **counterclaim**, or withdraw any particular claim made by him therein, without the leave of the Court, and the Court hearing an application for the grant of such leave may order **the action or counterclaim to be discontinued**, or any particular claim made therein to be struck out, as against any or all of the parties against whom it is brought or made on such terms as to costs, the bringing of a subsequent action or otherwise as it thinks just.

G 4. O. 21 r. 4 Subject to any terms imposed by the Court in granting leave under rule 3, the fact that a party has **discontinued an action or counterclaim** or withdrawn a particular claim made by him therein shall not be a defence to a subsequent action for the same, or substantially the same, cause of action.

H [16] It is said that in any language, there are no words with exactly identical meaning. Is there a difference between 'withdrawal' and 'discontinuance'? It would appear that I 'withdrawal' is used for matters like appearance, defence, any particular claim or even a summons as in an application whereas a

‘discontinuance’ is used with respect to an action, a claim or a counterclaim. In other words ‘discontinuance’ is used with respect to the main suit or action whether that of the plaintiff or defendant. What is withdrawn generally leaves behind something outstanding to proceed with. What is discontinued would normally leave nothing else to proceed further; there is an end to the whole matter. It may be a fine distinction, but a distinction nevertheless.

Pronouncement

[17] In the circumstance I allowed the plaintiff to discontinue their action against the defendant with liberty to file afresh with cost of RM500 to the defendant. The originating summons was thus struck off.

A

B

C

D

E

F

G

H

I